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IN THE

Supreme Court of the United States

CLARISSA BRADY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

If a complaint is used to give notice of a cause of action then why could it not also be used to give notice of a claim to the appropriate agency if it fully sets forth the claim within the guidelines of the Tort Claims Act and it is presented to that agency? Does not a de novo review require the Appellate Court to review all matters in dealing with jurisdiction as if first presented therein?

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 211 F.3d 499 (9th Cir. 2000). A Copy of the Opinion is included in the Appendix at Appendix A at 1a-10a. The Order of the District Court for the Northern District of Nevada is unpublished and is included in Appendix B at 11a-21a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Opinion on May 3, 2000. On or about June 16, 2000, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc which the United States Court of Appeals denied on July 19, 2000 (App. C at 22a-23a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

FEDERAL REGULATION AND STATUTES INVOLVED

ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

28 C.F.R. § 14.2

(a) For purposes of the provisions of 28 §§ U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly

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1. Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative. (b)(1) A claim shall be presented to the Federal agency whose activities gave rise to the claim. * * * *

* * * * *

Time for commencing action against United States
28 U.S.C. § 2401(b)

(b) a [A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

* * * * *

Disposition by federal agency as prerequisite evidence
28 U.S.C. § 2675(a)

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of the agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.
> * * * *

STATEMENT OF THE CASE

Clarissa Brady (hereinafter "Brady"), is the mother of Jeffrey K. Casares. On or before July 8, 1994, the United States of America (hereinafter "United States"), was treating Jeffrey K. Casares (through the U.S. Department of Health and Human Services hereinafter "Human Services") knowing that Jeffrey K. Casares was suicidal. Human Services did not take the care that was reasonable under the circumstances for the profession and did not take measures to protect Jeffrey K. Casares. Due to Human Services failure of reasonable care in the profession, Jeffrey K. Casares took his life which was preventable if Human Services provided adequate care as dictated by negligence law and United States statutes.

SUMMARY OF THE ARGUMENT

Under the Federal Tort Claims Act, (hereinafter "FTCA"), service of a complaint and summons on the agency in question should constitute service of notice of claim under 28 U.S.C. § 2401(b) and 28 C.F.R. § 14.2. There were two complaints filed regarding this case. The first complaint was styled as follows:

CLARISSA BRADY,

Plaintiff,

v.

NORMAN CAVANAUGH, DCHS; GUY DODSONS, SR., MHT; JOHN DE SANTES, PHD.; US DEPARTMENT OF HEALTH AND HUMAN SERVICES, DOES 1-V, BLACK AND WHITE CORPORATIONS I-V,

Defendants.

The second Complaint was styled as follows:

CLARISSA BRADY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

The first complaint was dismissed for failure to exhaust the administrative remedies of the Plaintiff. However, the first Complaint was not against the United States.

The complaint filed against the agency sets forth the requirements under the law to be given to the agency. Human Services was served with the Complaint on October 11, 1996. The agency had the information on which it could base its

determination on the claim. The fact that the agency did not do anything with the claim from the time it received it and the second complaint was filed is handled in the provisions of 28 U.S.C. § 2675(a). Appellant never filed a case against the United States until after the agency had an opportunity to dispose of the claim identified in the original complaint.

The District Court had jurisdiction over the original action under 28 U.S.C. § 2401(b) and § 2675(a). The District Court granted the motion to dismiss based on the failure to exhaust the administrative remedies.

Petitioner filed a timely appeal with the Court of Appeals for the Ninth Circuit on January 20, 1999. On May 3, 2000, the Court of Appeals affirmed the District Court's judgment. Ignoring the fact that Congress intended that Form 95 not be the all inclusive way to notify an agency regarding a claim against that agency. Petitioner's request for en banc review was denied on July 19, 2000. App. C at 22a-23a.

REASON FOR GRANTING THE WRIT

UNDER THE FEDERAL TORT CLAIMS ACT IT IS NOT NECESSARY THAT FORM 95 BE USED SO LONG AS THE MINIMAL REQUIREMENTS FOR NOTICE ARE GIVEN TO THE PROPER AGENCY.

Minimal notice is required under the FTCA for any litigation against the Government. *See Avery v. United States*, 690 F.2d 608, 611 (9th Cir. 1982) citing, S. Rep. No. 1327, 89th Cong. 2d Sess. 3-4 (1966), U.S. Code Cong. & Ad. News 2515, 2517. (This is represented by Form 95). The form itself is not needed to comply with the requirement of notice under the FTCA. This Court in *Avery v. United States*, 690 F.2d 608, 611 (9th Cir. 1982) held as follows:

> Thus, we hold that where a claimant gives notice of the manner and general circumstances of injury and the harm suffered, and a sum certain representing damages, he has complied with section 2675(a). Since the courts below did not apply the correct legal standard, and the claim was presented to the appropriate agency as required by statute, we reverse in both cases and remand for further proceedings.

It states in 28 C.F.R. § 14.2 as follows:

> (a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative. [emphasis added]

The question is compliance with the FTCA notice requirement. The following are comparisons between Form 95 and the Complaint filed on June 28, 1996. Form 95 has 19 numbered blanks to fill in and not all are relevant to Brady. The sections of the Complaint are set forth to the side of the corresponding section of Form 95.

Form 95 (Excerpt of Record Exhibit 18)	Complaint (Case No. CV-N-96-00416-ECR)
1.	Title of pleading (Summons filed November 15, 1996 served on October 11, 1996 and Certificate of Mailing on November 25, 1996)
2.	Pleading title and attorneys address on complaint and summons
3.	Not applicable
4.	Not applicable
5.	Not applicable
6.	Paragraph 6
7.	Not applicable
8.	Paragraphs 8 to 13
9.	Not applicable
10.	Paragraphs 8 to 13
11.	Paragraph 9
12a.	Not applicable
12b.	Not applicable
12c.	Paragraphs 4, 12 to 14
12d.	Paragraphs 4, 12 to 14
13a.	Page 3 Oath and Verification
13b.	Attorney's number on complaint
14.	June 25, 1996
15.	Not applicable
16.	Not applicable
17.	Not applicable
18.	Not applicable
19.	Not applicable

The information contained in the Complaint does have the necessary items pursuant to Form 95 and as required by Avery. The Complaint was also signed under oath by Brady and delivered by her attorney, who clearly is her representative, to Human Services. The Complaint identifies Brady and her right to make claim under the FTCA. The Complaint filed by Brady in 1996 has only one additional item that Form 95 does not which is the filing stamp with the United States District Court. What if the Complaint was not filed and it was sent to the agency would the Circuit Court have affirmed the District Court's dismissal of the present case based on the case law? There is no requirement that Form 95 be used and in fact several decisions have held that the Form 95 is not exclusive to notice the United States under the FTCA. *See Molinar v. United States*, 515 F.2d 246 (5th Cir. 1975) (Letter with medical bills and car damage complied with applicable regulations under the FTCA); *Korkaras v. United States*, 750 F. Supp. 542, 545 (D.N.H. 1990) (Court noted that Form 95 is not needed and that other written notification of incident with claim for damages will suffice under § 2675(a)); *Williams v. United States*, 693 F.2d 555 (5th Cir. 1982) (Letter sent by attorney with damage amount to agency complied with provisions of FTCA). Based on the service of the Complaint as against Human Service, Brady has complied with the notice requirement under the FTCA. The Complaint was personally served on the correct Governmental Agency with the proof of that service. Clearly the notice provisions of the FTCA were met. The Circuit Court is overly concerned with form versus function. Why should there be any difference so long as the notice was given in the prescribed time? The Circuit Court stated that Plaintiff failed to comply with the letter of 28 U.S.C. § 2675(a) and the spirit and purpose of the statute. App. A at 8a. Even though the court states this as a reason the Circuit Court

ignored the fact that was presented that the agencies will not assist anyone who may need Form 95. If the United States can not live up to the spirit of the Act then why is the ordinary citizen slapped with that requirement?

The amount in controversy complies with the sum certain required under the FTCA. The court in *Exrleben v. United States*, 668 F.2d 268 (7th Cir. 1981) ("$149.42 presently [claimed].)" The court found that this was sufficient compliance with the applicable regulations.) In the present case, the Complaint states in excess of $50,000. A monetary sum is given in the present case and therefore, would comply with the FTCA requirement. The Complaint was latter amended by Form 95. This amendment is supported by the decision in *Williams v. United States*, 693 F.2d 555 (5th Cir. 1982) (Claim was amended by Attorney letter sent after the 2 year statute of limitations had run.)

Lets speak to the confusion of the Circuits in this area. Simple letters are sufficient to provide notice under the FTCA. *See Molinar v. United States*, 515 F.2d 246 (5th Cir. 1975); *Korkaras v. United States*, 750 F. Supp. 542, 545 (D.N.H. 1990); *Williams v. United States*, 693 F.2d 555 (5th Cir. 1982). Yet a Complaint that has the same information could not be notice because it did not allow the agency to perform its function under the FTCA. This is a false assumption. There was no case filed as against the United States and the U.S. Attorney's office was aware that the agency was served and did defend the agency on the Complaint. The court case was dismissed. After the dismissal all that was present was a document that was served on the agency with all the items required in the FTCA. If Form 95 would have been filed without the lawsuit what the agency would have had in its possession would be the same as it had after the dismisal of the first Complaint. There is no difference to the agency.

In the cases of *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (9th Cir 1980); *Driggers v. United States*, 309 F. Supp. 1377 (D.C.S.C. 1970); *Henderson v. United States*, 785 F.2d 121 (4th Cir. 1986); *Meeker v. United States*, 435 F.2d 1219 (8th Cir. 1970); *Miller v. United States*, 418 F. Supp. 373 (D.C. Minn. 1976); *Peterson v. United States*, 428 F.2d 368 (8th Cir. 1970), all discussed what was notice under the FTCA. In the case of *Henderson v. United States*, 785 F.2d 121, 126 (4th Cir. 1986) the court held that:

> [T]he appellants' cause of action accrued on the date of the collision. We also hold that the filing of appellants' suits in state court did not satisfy the requirement of filing an administrative claim with the appropriate government agency.

What all of these cases did not have was the agency as a party to the prior Complaint. In the present case the agency was given notice to the claim and this decision perpetuates the "unjust consequences of sovereign immunity" that *Feres v. United States*, 340 U.S. 135, 139, 71 S. Ct. 153, 156, 95 L. Ed. 152 (1950) spoke out against. In the case of *Kelley v. United States*, 568 F.2d 259, 265 (1978) the court states that:

> [A]lthough the suit against the employee is not literally within Section 2677 because it is not formally an action against the United States, it may be settled in the same manner as if it were.

The prior action herein was not plead against the United States. Kelley would find that the United States agency was given notice sufficient under 28 U.S.C. § 2675(a). Kelly further stated that:

> But even if that were requisite in a case started against the federal employee in the state court, no persuasive reason for not considering the service of the complaint to be an adequate claim-making appears: Section 2679(e) and 28 C.F.R. § 15.1 assure the prompt presentation of the process and pleadings to appropriate officers of the Government * * *

Id. at 268. The naming and service of the agency is a critical difference in the review of the present issue. In addition the U.S. Attorney would have authority to settle the claim which seems to be the concern of the Ninth Circuit in its decision. What the Ninth Circuit ignored was that the FTCA was created to remove barriers to filing law suits not adding immunities back into the law that do not exist.

CONCLUSION

If the determination of the Ninth Circuit Court is allowed to stand there will be inconsistency in the Circuits and even inconsistency in the Ninth Circuit as it would be contrary to the decision in Avery. Also, the basic reason for the FTCA, which was to allow citizens the right to sue for wrongdoing, would be thwarted and an additional layer of requirements would be added to the public that were not contemplated by Congress. Therefore, this Writ should be granted so that the Court can give guidance to all of the Circuits.

DATED this 17th day of October, 2000.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MAY 3, 2000

United States Court of Appeals,
Ninth Circuit.

Clarissa BRADY,

Plaintiff-Appellant,

v.

UNITED STATES of America,

Defendant-Appellee.

No. 99-15135.

Submitted April 12, 2000[1]

Filed May 3, 2000

* * *

Appeal from the United States District Court for the District of Nevada.

Before: TASHIMA, and GRABER, Circuit Judges, and STOTLER,[2] District Judge.

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1. The panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P. 34(a)(2).

2. The Honorable Alicemarie H. Stotler, United States District Judge for the Central District of California, sitting by designation.

Appendix A

GRABER, Circuit Judge:

Plaintiff Clarissa Brady, acting as personal representative of the estate of her late son, sued the United States for wrongful death under the Federal Tort Claims Act (FTCA). She alleged that three doctors at a federal clinic were negligent in failing to prevent her son from committing suicide. After setting aside a clerk's default against the government, the district court dismissed Plaintiff's action on the ground that Plaintiff had failed to exhaust her administrative remedies by presenting an administrative claim to the appropriate federal agency before filing her complaint in district court. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff has filed two similar complaints, both alleging wrongful death based on her son's suicide. She filed her first complaint on June 28, 1996, naming a number of defendants, including the United States Department of Health and Human Services. The district court dismissed that complaint because Plaintiff had failed to exhaust her administrative remedies, as required by the FTCA. See 28 U.S.C. § 2675(a). The district court allowed Plaintiff 20 days within which to file an amended complaint. After she did not refile during that period, the court dismissed the complaint without prejudice.

On August 12, 1997, Plaintiff filed her second complaint, which is the subject of this appeal. That complaint names only the United States as a defendant. In her second complaint, Plaintiff alleges that she complied with the administrative claim requirements of 28 U.S.C. § 2675(a).

Appendix A

Although it is not expl[illegible] the second complaint, Plaintiff's argument was, and is, that she complied with that requirement by serving Defendant with her first complaint in 1996.

On December 8, 1997, Defendant moved to dismiss Plaintiff's second complaint, again on the ground that Plaintiff had failed to file an administrative claim. However, Defendant did not attach proof of service to its motion and, on February 3, 1998, the district court struck the motion. On February 11, a clerk's default was entered against Defendant for failing to respond to Plaintiff's complaint in a timely manner.

Defendant asserts that it did not receive a copy of the clerk's default until June 9, 1998. After receiving it, Defendant moved on June 15 to have the default set aside, arguing that its failure to include the proof of service was a clerical error that had not prejudiced Plaintiff. Defendant also argued, in its reply memorandum, that the district court lacked jurisdiction over Plaintiff's complaint, because Plaintiff had not satisfied the jurisdictional requirement of filing an administrative claim under the FTCA. Defendant further argued that, because the court lacked jurisdiction over the complaint, it necessarily also lacked jurisdiction to enter a default judgment. On July 27, 1998, the district court set aside the default without comment.

Defendant had filed a second motion to dismiss, this one complete with proof of service, on March 5, 1998, while the clerk's default was in force. After granting Defendant's motion to set aside the default, the district court agreed to consider that second motion and directed Plaintiff to reply.

Plaintiff replied. On December 22, 1998, the district court granted Defendant's motion to dismiss. In dismissing Plaintiff's complaint, the court concluded that Plaintiff again had failed to comply with the FTCA requirement that she file an administrative claim before suing the federal government. Because Plaintiff had failed to comply with that requirement, the court held that it lacked subject-matter jurisdiction over Plaintiff's action.

Plaintiff timely filed a notice of appeal. On January 12, 1999, she also filed an administrative claim with the Department of Health and Human Services. That administrative claim, which was presented on a standard Form 95 (Claim for Damage, Injury, or Death), alleges the same wrongful conduct that was the foundation of this action and of Plaintiff's first action.

STANDARD OF REVIEW

Dismissal for lack of subject-matter jurisdiction is reviewed de novo. See United States ex rel. Newsham v. Lockheed Missiles & Space Co., 171 F.3d 1208, 1213 (9th Cir.1999), cert. denied, __ U.S. __, 120 S.Ct. 2196, __ L.Ed.2d __ (2000). We review for abuse of discretion a district court's decision to set aside an entry of default. See O'Connor v. Nevada, 27 F.3d 357, 364 (9th Cir.1994).

Appendix A

DISCUSSION

I. Subject-Matter Jurisdiction

The requirement that a party file an administrative claim before filing an action under the FTCA arises from 28 U.S.C. § 2675(a), which provides in part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

The requirement of an administrative claim is jurisdictional. See Cadwalder v. United States, 45 F.3d 297, 300 (9th Cir.1995). Because the requirement is jurisdictional, it "must be strictly adhered to. This is particularly so since the FTCA waives sovereign immunity. Any such waiver must be strictly construed in favor of the United States." Jerves v. United States, 966 F.2d 517, 521 (9th Cir.1992) (citations and internal quotation marks omitted).

Appendix A

Plaintiff did not present an administrative claim to the Department of Health and Human Services until after her first and second complaints were dismissed. Accordingly, she does not satisfy the statutory requirements that she first file such a claim, and have it finally denied by the agency in writing, before filing her complaint in district court. Nevertheless, she argues that she satisfied the requirements of 28 U.S.C. § 2675(a) in this case, because her first complaint put the agency on notice of all the essential elements of her claim. In Plaintiff's view, the service of that first judicial complaint on the agency, in 1996, amounted to the presentation of an administrative claim to the agency, thus satisfying the jurisdictional prerequisite for her second complaint.

Plaintiff points out that she was not required to present her claim to the agency on Form 95, so long as she presented the functional equivalent of that form. She also suggests that this court has interpreted 28 U.S.C. § 2675(a) as requiring only "minimal notice" to an agency, citing Avery v. United States, 680 F.2d 608, 611 (9th Cir.1982). Avery held that a "skeletal" administrative claim that informed the agency of the nature of the alleged injury and the amount of damages was sufficient under the FTCA. See id. at 610-11.

Plaintiff's argument misses the mark. The difficulty with her complaints is not that they are too "skeletal" but, rather, that she filed them in district court without first filing any claim whatsoever with the agency. The purpose of the FTCA's administrative claim procedure is "to encourage administrative settlement of claims against the United States and thereby to prevent an unnecessary burdening of the

courts." Jerves, 966 F.2d at 520. As the Supreme Court noted in McNeil v. United States, 508 U.S. 106, 112, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993):

> Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims.

(Footnote omitted.)

The plaintiffs in Avery satisfied the purpose of the requirement because their administrative claim, while imperfect, was an administrative claim. It put the agency on notice of every essential feature of the plaintiffs' case, allowing the agency to investigate and, if possible, settle the case before it went to court. That is not so here. Plaintiff first informed the agency of her allegations by suing it in 1996. When the district court granted Defendant's first motion to dismiss, and Plaintiff declined to file an amended complaint or an administrative claim within the 20-day period allotted in the dismissal, there was nothing to indicate to the government that the case was still pending, or that Plaintiff wished to pursue an administrative remedy. All that the agency had was Plaintiff's dismissed complaint. As far as the record shows, Plaintiff never asked the agency to treat that complaint as an administrative claim, or in any other

way indicated her desire to pursue the matter further, before she filed her second complaint.

In other words, the only periods during which the agency had any indication that Plaintiff was pursuing this matter were while her judicial complaints were pending at the district court. Thus, although her first complaint may have given the agency "notice" in one sense of the word, it did not give the agency the timely notice of a live controversy that would have allowed the agency to investigate administratively and possibly settle the case before it resurfaced in district court. Plaintiff has not only failed to comply with the letter of 28 U.S.C. § 2675(a), she has, despite her argument to the contrary, also failed to comply with the statute's spirit and purpose. That much is clear from the fact that this case twice has been filed in district court, and now is before this court, but never has been the subject of any administrative claim, investigation, settlement negotiation, or hearing.[3]

In sum, Plaintiff's first dismissed complaint was not an administrative claim within the meaning of 28 U.S.C. § 2675(a). Therefore, Plaintiff again has failed to comply with that statute's jurisdictional requirement that she file an administrative claim. The district court did not err in granting Defendant's motion to dismiss.

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3. As noted, Plaintiff filed an administrative claim with the Department of Health and Human Services three weeks after her second complaint was dismissed. Such a claim must be presented to an agency before an action may be filed in district court. Plaintiff's later filing of a claim is irrelevant to the question whether the district court erred in concluding that Plaintiff had failed to satisfy that requirement at the time she filed her second complaint.

II. Defendant's Motion to Set Aside the Default

A district court may set aside a clerk's entry of default for "cause shown." Fed.R.Civ.P. 77(c). At the district court, Defendant argued that its failure to respond to Plaintiff's complaint on time was the result of a clerical error and, further, that the default was improper because the district court lacked jurisdiction over the case. The district court set aside the entry of default without comment. Plaintiff argues that the default should not have been set aside, because Defendant failed to file its response on time and also failed to move to set aside the default within a reasonable time.

At most, Plaintiff's truncated argument on this point suggests that the district court would have had grounds not to set aside the default. But see Fed.R.Civ.P. 55(e) ("No judgment by default shall be entered against the United States . . . unless the claimant establishes a claim or right to relief by evidence satisfactory to the court."). But Plaintiff has not demonstrated that the district court abused its discretion by accepting Defendant's explanation of the delay and setting aside the default. In view of the fact that a district court's discretion is "especially broad" when, as in this case, "it is entry of default that is being set aside, rather than a default judgment," Plaintiff's argument that the default should not have been set aside is unpersuasive. O'Connor, 27 F.3d at 364 (citation and internal quotation marks omitted).

III. Unpreserved Arguments

Plaintiff makes several other arguments, asserting that the district court committed various errors. Plaintiff did not

present those arguments in any form to the district court. Accordingly, they are not preserved, and we decline to address them on appeal.

CONCLUSION

The district court did not err in granting Defendant's motion to dismiss; nor did the court abuse its discretion in granting Defendant's motion to set aside default.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA DATED DECEMBER 10, 1998 AND FILED DECEMBER 21, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-N-97-00478-DWH (PHA)

CLARISSA BRADY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Motion to Dismiss

Before the court is defendant's motion to dismiss (#s 10, 13) for failure to file an administrative claim. Plaintiff has opposed (#14) and defendant has replied (#15).

The issue before the court is whether the service of plaintiff's first complaint, which was dismissed, satisfies the jurisdictional prerequisite required in the instant action as outlined in 28 U.S.C. §2675(a). This jurisdictional prerequisite is that a claimant shall present its claim to the appropriate federal agency before instituting an action for

money damages s against the United States under the Federal Tort Claims Act t ("FTCA").

The court fin nds the service of plaintiff's first complaint does not satisfy th this jurisdictional prerequisite and therefore, the court is de eprived of subject matter jurisdiction. Defendant's mot tion to dismiss is granted.

Factual Background

Plaintiff firs rst filed a complaint ("First Complaint") against the def fendant on June 28, 1996. This case, CV-N-96-416-EC CR, was dismissed for failure to exhaust administrative re emedies and plaintiff was allowed 20 days to file an amende ed complaint. *See* Defendant's Reply (#15) (attached Minute e Order dated March 20, 1997). After those twenty days had p passed without a filing, the court dismissed the action without t prejudice. *Id.* (attached Minute Order dated April 15, 1997).

Presently, be efore this court, plaintiff has re-filed her complaint. Plaint tiff, the natural mother, heir and personal representative of f the Estate of Jeffrey Casares, has brought this wrongful dea ath action[1] against the Department of Health and Human Servi ices ("Department"), Norman Cavanaugh, Guy Dodsons, Sr., and John DeSantes. These individuals were employed b by the Department as health care providers at the Owyhee C Community Health Facility in Owyhee, Nevada. *See* Com nplaint (#1) at 1.

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1. Under *Erie*, , this action was brought pursuant to NRS 41.085.) at 2.
See Complaint (#1)

Appendix B

Plaintiff alleges on July 8, 1994, Jeffrey Casares died from injuries caused by defendants' negligence. *Id.* at 2. Plaintiff asserts she presented her claim to the Department on or about September 12, 1996, September 30, 1996, October 11, 1996 and November 26, 1996 by serving copies of her dismissed complaint pursuant to 28 U.S.C. §2675(a). *See* Complaint (#1) at 2; Plaintiff's Opposition (#14) at 1. Plaintiff also contends the Department has not responded to her claim by either accepting or denying it. Therefore, plaintiff argues, the court has jurisdiction under §2675(a) since the Department has failed to make a final disposition of her claim within six months after it was filed. *Id.*

Analysis

A. Motion to Dismiss Standard

On a motion to dismiss for lack of subject matter jurisdiction, plaintiff bears the burden of establishing subject matter jurisdiction because it is plaintiff who is seeking to invoke the court's jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Sopcak v. Northern Mountain Helicopter Service*, 52 F.3d 817, 818 (9th Cir. 1995). In effect, the court presumes lack of jurisdiction until plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be made on the basis that the complaint fails to allege grounds for federal subject matter jurisdiction as required by Rule 8(a). *Thornhill Publishing Co. v. General Tel. & Electronics*, 594 F.2d 730, 733 (9th

Cir. 1979). For example, lack of federal jurisdiction appears from the "face of the complaint." *Id.*

If a Rule 12(b)(1) motion challenges plaintiff's complaint on the basis that the complaint fails to sufficiently allege grounds for federal subject matter jurisdiction, then all material allegations in the complaint are accepted as true for the purposes of the motion. *Trentacosta v. Frontier Pacific Aircraft Industries, Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987).

B. 28 U.S.C. §2675(a)

The United States, as sovereign, is immune from suit unless it has consented to be sued. *United States v. Testan*, 424 U.S. 392, 399 (1976). Congress may specify the terms and conditions of such suits as it authorizes. *Honda v. Clark*, 386 U.S. 494, 501 (1967). The requirement that an administrative claim be filed as a prerequisite to the filing of a suit under the FTCA exemplifies one such condition. *See* 29 U.S.C. §§1346, 2671, 2675(a), *et seq.*; See *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985). Compliance with this requirement pursuant to 28 U.S.C. §2675(a) is a jurisdictional prerequisite and such claims must precede any suit. *Best Bearings Co. v. United States*, 463 F.2d 1177, 1179 (7th Cir. 1972) (in 1966, §2675(a) was amended and now provides that an administrative claim is a jurisdictional prerequisite to filing or maintaining a civil action under the FTCA); *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Berit v. V.A. Hospital*, 860 F.2d 338 (9th Cir. 1988). This requirement cannot be waived. *Burns*, 764 F.2d at 724; *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979);

Erxleben v. United States, 668 F.2d 268 (7th Cir. 1981). In this respect, the administrative claim requirement is not unlike the two year limitation period contained in 28 U.S.C. §2401(b). This limitation has been held many times to be a jurisdictional requirement, one not capable of a waiver or subject to an estoppel. See *Powers v. United States*, 390 F.2d 602 (9th Cir. 1968); *Driggers v. United States*, 309 F.Supp. 1377 (D.C.D.S.C. 1970).

Congress has mandated the prior presentation of a claim to a responsible federal agency to expedite the fair settlement of tort claims, ease court congestion, and avoid unnecessary litigation. *See* 1966 U.S. Code Cong. and Admin. News, p. 2515. This requirement is not meant to thwart claims, but permit the affected agency to fully investigate the accident and to accept or reject an offer of settlement prior to trial. See *Adams v. United States*, 615 F.2d 284 (5th Cir. 1980); *Interboro Mut. Indem. Ins. Co. v. United States*, 431 F.Supp. 1243 (E.D.N.Y. 1977).

The language of 28 U.S.C. §2675(a), as amended, is clear and unambiguous and phrased in mandatory terms. *Bearings*, 463 F.2d at 1179. §2675(a), "Disposition By Federal Agency as a Prerequisite" provides in relevant part:

> An action shall not be instituted upon a claim against United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, *unless* the claimant shall have first presented the claim to the appropriate federal

> agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. (emphasis added)

The issue before the court is whether the service of plaintiff's first complaint, which was dismissed, satisfies the jurisdictional prerequisite required in the instant action as outlined in 28 U.S.C. §2675(a). This jurisdictional prerequisite is that a claimant shall first present its claim to the appropriate federal agency before instituting an action for money damages against the United States under the FTCA.

Plaintiff contends its service of the first complaint (case no. CV-N-96-416-ECR) on the Department (on or about September 12, 1996, September 30, 1996, October 11, 1996 and November 26, 1996) was sufficient to satisfy the jurisdictional prerequisite in the instant action. Plaintiff argues the complaint contained all the information required under §2675(a). Moreover, plaintiff asserts the Department has not responded to its claim by either accepting or denying it. Therefore, plaintiff argues, the court has jurisdiction under §2675(a) since the Department has failed to make a final disposition of her claim within six months after it was filed.

On the other hand, defendant contends the service of plaintiff's first complaint is not the equivalent of first presenting an administrative claim to the appropriate federal agency and does not satisfy the jurisdictional prerequisite of §2675(a).[2] Therefore, the court is deprived of subject matter jurisdiction and the case should be dismissed.

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2. Defendant provides a declaration by Timothy M. White, an employee of the Department, to demonstrate that he searched in the (Cont'd)

The court agrees with defendant's assertions and finds the service of plaintiff's first complaint does not satisfy the jurisdictional prerequisite of 28 U.S.C. §2675(a) in the instant action. Although a case of first impression in the Ninth Circuit, the Seventh and Eighth Circuits clearly have held the mere filing of a suit does not meet the requirement of §2675(a) of first presenting a claim to the appropriate federal agency.[3] See *Best Bearings Co. v. United States*, 463 F.2d 1177 (7th Cir. 1972); *Peterson v. United States*, 428 F.2d 368 (8th Cir. 1970); *Meeker v. United States*, 435 F.2d 1219 (8th Cir. 1970); *Driggers v. United States*, 309 F.Supp. 1377 (D.C.S.C. 1970). The court agrees with this conclusion because the language of §2675(a) is clear and unambiguous. Interpreting this statute on its face, the court finds presenting an administrative claim to the appropriate federal agency is undeniably a jurisdictional prerequisite to the filing of a civil action under the FTCA.

(Cont'd)
relevant office for an administrative claim by plaintiff and no such claim was found. White concluded that to the best of his knowledge, information and belief, no administrative tort claim has been filed by plaintiff.

3. See also *Henderson v. United States*, 785 F.2d 121 (4th Cir. 1986) (filing of suit in state court against substitute rural mail carrier employed by Postal Service did not satisfy the requirement of filing an administrative claim prior to bringing suit under Federal Tort Claims Act. Such a holding would be tantamount to judicial repeal of provisions requiring exhaustion of administrative remedies); See also *Miller v. United States*, 418 F.Supp 373 (D.C. Minn. 1976) (plaintiff does not satisfy requirement of filing administrative claim by commencing action in state court against individual employee)

Nevertheless, in plaintiff's first action, the first presentation by plaintiff to the Department of Health and Human Services was a federal action already instituted. *See* Opposition (#14) at 1. This was clearly contradictory to the procedural requirements of §2675(a) which state an action cannot be brought until it is first presented to the appropriate agency. Instead, plaintiff *first* brought the action and *then* notified the agency. *Id.* (see attached copies of complaint dismissed by Judge Reed and served on defendant on the four alleged dates). Plaintiff unquestionably disregarded the jurisdictional prerequisite of presenting the administrative claim first.

Now, with respect to the instant action, plaintiff argues its earlier services of the first complaint are the equivalent of presenting an administrative claim to the Department of Health and Human Services as required by §2675(a). The court finds plaintiff cannot make this jurisdictional nexus. Congress' purpose in creating the administrative claim requirement was to permit the affected federal agency to fully investigate the accident and to accept or reject an offer of settlement prior to trial. However, plaintiff's first complaint was dismissed by Judge Reed for failure to exhaust administrative remedies. Thus, the court finds defendant had no reason to fully investigate the accident nor expect any forthcoming action without the filing of an administrative claim by plaintiff. At any rate, plaintiff never filed any additional documentation with the defendant from the time her claim was dismissed until the filing of her second complaint before this court. Thus, the court concludes the service of plaintiff's first complaint cannot serve as the equivalent of first presenting an administrative claim to the Department in the instant action.

Additionally, the court believes if it were to conclude that the service of plaintiff's first complaint satisfied the jurisdictional prerequisite of §2675(a), nothing would prevent a potential plaintiff from merely filing and serving a complaint, having it dismissed and then using it as the jurisdictional prerequisite in a second action. This would allow a potential plaintiff to bypass the procedural requirement of filing an administrative claim and allow a judicially created exception to swallow the rule.

Plaintiff also raises an alternative argument, providing a line of cases where claimants who had failed to state the amount of their damages in a sum certain had nevertheless made a sufficient statement of the damages to comply with the jurisdictional requirements of §2675(a). See *Molinar v. United States*, 515 F.2d 246 (5th Cir. 1975); *Erxleben v. United States*, 668 F.2d 268 (7th Cir. 1981); *Korkaras v. United States*, 750 F.Supp. 542 (D.N.H. 1990); *Williams v. United States*, 693 F.2d 555 (5th Cir. 1982). Plaintiff argues if these presentations were sufficient, her complaint is equally sufficient.

However, none of plaintiff's supporting cases provide an example when an actual complaint was the first presentation of the claim to the appropriate federal agency. The court finds this to be the case for two reasons. First, as demonstrated above, a complaint cannot be the first presentation. Otherwise, the language of §2675(a) would be contradicted. Second, the amount of damages claimed against the United States under the FTCA must be stated in a sum

certain. See 28 C.F.R. §14.2;[4] *Burns*, 764 F.2d at 725. Plaintiff's complaint, like the majority of complaints, states an uncertain amount in damages. Plaintiff's first complaint prayed for damages in excess of $50,000. Therefore, plaintiff's first complaint fails to comport with the requirements of §2675(a), 28 C.F.R. § 14.2 and Ninth Circuit law.

In addition, the court could also provide a similar line of cases where the claimant who had failed to state his amount of damages in a sum certain, but who had presented some statement of his damages, had made an insufficient statement to comply with the jurisdictional requirements of §2675(a). See, e.g., *Bialowas v. United States*, 443 F.2d 1047 (3rd Cir. 1971); *Lovell v. Unknown Federal Correctional Officers*, 595 F.2d 281 (5th Cir. 1979); *Allen v. United States*, 517 F.2d 1328 (6th Cir. 1975). Therefore, the court concludes plaintiff's alternative argument is unpersuasive as well.

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4. 28 C.F.R. §14.2 "Administrative claim; when presented"

> (a) For purposes of the provisions of 28 U.S.C. 2401(b) and 2672, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages *in a sum certain* for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident. (emphasis added)

Appendix B

III. *Conclusion*

The court finds the service of plaintiff's first complaint does not satisfy the jurisdictional prerequisite of 28 U.S.C. §2675(a) in the instant action. Therefore, the court is deprived of subject matter jurisdiction. Even taking the allegations as true, plaintiff failed to exhaust her administrative remedies as required by the Federal Torts Claim Act. Accordingly, **IT IS ORDERED** that defendant's Motion to Dismiss (#7) be *GRANTED*.

DATED: This 10th day of December, 1998.

s/ [illegible]
UNITED STATES DISTRICT
JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 19, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15135
D.C. No. CV-97-00478-DWH

CLARISSA BRADY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Before: TASHIMA, and GRABER, Circuit Judges, and STOTLER,[1] District Judge.

The panel has voted to deny the petition for rehearing. Judges Tashima and Graber have voted to deny the petition for rehearing en banc, and Judge Stotler has so recommended.

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1. The Honorable Alicemarie H. Stotler, United States District Judge for the Central District of California, sitting by designation.

Appendix C

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.